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(1)

No. 08-473

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Petitioner,

v.

CADREE B. MATTHEWS,

Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of New Jersey,
Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 23, 2008

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to review a State Appellate Division opinion that was plainly decided on adequate and independent state grounds?

2. Whether an anonymous tip, standing alone, is insufficient to justify a *Terry v. Ohio*, 393 U.S. 1 (1968), stop and frisk, as well as the resultant search of a motor vehicle?

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RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The Respondent, Cadree B. Matthews, respectfully requests that a writ of *certiorari* be denied to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in the above-entitled proceeding on March 10, 2008, Discretionary review of that opinion was denied by the New Jersey Supreme Court on July 15, 2008.

OPINIONS BELOW

The Order of the New Jersey Supreme Court denying discretionary review in this case is reported at *State v. Matthews*, 196 N.J. 344, 953 A.2d 763 (2008), and is reprinted in the Petitioner's Appendix at 1a. The opinion and judgment of the Superior Court of New Jersey, Appellate Division, which is the subject of the Petitioner's request for a writ of *certiorari*, is reported at *State v. Matthews*, 398 N.J. Super. 551, 942 A.2d 797 (App. Div. 2008), and is reprinted in the Petitioner's Appendix at 2a to 13a. The unreported opinion of the Superior Court of New Jersey, Law Division, is reprinted in the Petitioner's Appendix at 13a to 19a.

JURISDICTION

Respondent submits that this Court lacks jurisdiction under 28 U.S.C. §1257(a), to review any portion of the judgment of the unanimous ruling of the Superior Court of New Jersey, Appellate Division, that the Respondent was entitled

to the suppression of evidence. Primary reliance was placed upon New Jersey cases interpreting the New Jersey Constitution. As the opinion rests upon an adequate and independent state ground, it is not subject to review by this Court. See *Arizona v. Evans*, 514 U.S. 1, 6-7, 115 S.Ct. 1185, 1189-90 (1995); *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476-77 (1983).

The Appellate Division found dispositive the case of *State v. Richards*, 351 N.J. Super. 289, 303-04, 798 A.2d 136 (App. Div. 2002), in holding that an anonymous tip, standing alone, cannot justify a stop and frisk. Additionally, the court engaged in an extended analysis of state case law, including in particular *State v. Goree*, 327 N.J. Super. 227, 742 A.2d 1039 (App. Div. 2000), in concluding there was no articulable and reasonable basis for the stop and frisk. *Goree* was a state-law ruling that preceded this Court's decision in *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375 (2000), to affirm the Florida Supreme Court's rejection of the stop.

Although, in the present case, the Appellate Division also cited to *J.L.*, this state court decision does not fairly appear to rest primarily on federal law or to be interwoven with such law. Jurisdiction does not therefore lie. In the alternative, Respondent asks for a remand to the Superior Court of New Jersey, Appellate Division, for clarification.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES AMENDMENT XIV

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF NEW JERSEY ARTICLE I, PARAGRAPH 7

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

COUNTERSTATEMENT OF THE CASE

New Jersey police officers received a report from their headquarters of an individual flashing a gun in a burgundy Durango with a temporary license plate in a specified block.[1] No testimony was provided as to whether this information was current or from an earlier time period. The anonymous caller gave no description of the suspect. The caller did not provide any personal identifying information such as his or her own name or address. The caller did not relate whether he or she was an eyewitness or was merely reporting rumor.

The police responded to the area, a well-lit business district, and located a parked burgundy Durango with a temporary license plate. No suspicious conduct was observed but the vehicle did appear to be occupied by three people.

One officer took cover and one officer approached and ordered the driver to place his keys on the roof and exit the vehicle. A pat-down did not reveal any gun. The two passengers were removed and their pat-downs also did not reveal any gun. There was no testimony that the occupants acted in a suspicious or nervous manner. Additional officers arrived. Officers then searched the vehicle and located a gun under the front passenger seat. The three occupants were then arrested.

After the search and seizure of the gun, Respondent sought to approach the area of the police investigation and refused to leave. He was placed under arrest for

[1] The Statement of Facts from the State Prosecutor's trial brief notes that there was a report of a person flashing a gun "in the rear window" of a vehicle. The trial judge appears to have adopted this statement of facts in his written opinion, however, there was no testimony by the police officer regarding a "rear window" nor is a "rear window" mentioned in the police report of the incident.

disorderly conduct and resisting arrest. He then informed the police that the gun belonged to him and the occupants of the vehicle did not know that he had placed his gun in the vehicle. Under New Jersey case law, Respondent has automatic standing to contest the illegal seizure of the gun. *State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981).

The trial judge denied the motion to suppress. The Superior Court of New Jersey, Appellate Division, unanimously reversed the trial judge and ruled that the search of the vehicle based upon the anonymous tip, standing alone, violated the constitutional rights of the Respondent. The Supreme Court of New Jersey denied the State's petition for certification.

REASONS FOR DENYING THE WRIT

The Superior Court of New Jersey, Appellate Division, properly suppressed the gun found in a vehicle. Based upon nothing more than an anonymous tip, the court found that the search was conducted in violation of Respondent's constitutional rights.

This case turns on the facts before it. No substantial question is presented. If this Court disagrees with Respondent's jurisdictional argument, supra, and determines that the opinion in question is subject to the Court's jurisdiction, Respondent submits that *certiorari* should be denied because this case is no more than a routine application of well-established search and seizure law. Although the Petitioner seeks to use this case to reexamine the holding of *J.L.*, no reason to disturb it exists in this case. *J.L.* draws a bright line that "more" is needed than a bare-boned anonymous tip. The cases that follow or distinguish *J.L.* lay or fall upon the particular facts of the searches involved in each case analyzed.

A sampling of cases from the various circuits indicate that their rulings distinguishing *J.L.* were clearly factually-based and did not question the holding of *J.L.* as it applies to anonymous tips standing alone: *United States v. Ruidiaz*, 529 F.3d 25 (1st Cir.), *cert. denied*, 129 S. Ct. 440 (2008) (report of gunfire along with confirmatory observations); *United States v. Elmore*, 482 F.3d 172 (2d Cir. 2007) (multiple calls from named caller, who was defendant's ex-girlfriend, over concern that defendant was armed and might hurt someone); *United States v. Muhammad*, 463 F.3d 115 (2d Cir. 2006) (officers observed evasive action by bicyclist); *United*

States v. Harrell, 268 F.3d 141 (2d Cir. 2001) (anonymous caller reported men with guns were in a described vehicle and taken a shot at the caller a week earlier. Police spotted the vehicle with heavily tinted windows and a brake light problem, both in violation of state law. Driver was removed and he fled. Search of driver's grab area found proper); *United States v. Torres*, 534 F.3d 207 (3d Cir. 2008) (cab driver relaying personal observation of gun pointing as well as direction of travel of suspect vehicle that cab driver was following); *United States v. Elston*, 479 F.3d 314 (4th Cir.) *cert. denied*, 127 S.Ct. 2151 (2007) (caller reporting drunk driver with gun threatening to let clips of ammunition "off in somebody"); *United States v. Arjona-Martinez*, 66 Fed. Appx. 525 (5th Cir. 2003) (reliable informant tip regarding drug smuggling along with corroboration by border patrol and consent search); *United States v. Reed*, 220 F.3d 476 (6th Cir. 2000), *cert. denied*, 2001 LEXIS 618 (2001) (probable cause existed to arrest defendant for trespassing); *United States v. Hicks*, 531 F.3d 555 (7th Cir. 2008) (named caller (describing himself) reported armed man (describing suspect) beating a woman in caller's home); *United States v. Anderson*, 339 F.3d 720 (8th Cir.), *cert. denied*, 157 L. Ed. 2d 762 (2003) (multiple callers reported enraged male walking with gun threatening a driver and getting into a specified tractor-trailer); *United States v. Terry-Crespo*, 356 F.3d 1170 (9th Cir. 2004) (named victim reported having gun pointed at him by a described suspect in a specific location and during resultant pat-down, gun fell from waistband); *United States v. Aguilera*, 287 F. Supp. 2d 1204 (E.D. Cal. 2003) (one student's parent reported description of armed student entering school and resultant pat-down

revealed gun in waistband); *United States v. Sanchez*, 519 F.3d 1208 (10th Cir.), *cert. denied* 2008 LEXIS 7262 (2008) (police flagged down by a woman stating a man was beating a woman at intersection and when police responded neighbors pointed to an urgently departing vehicle); *United States v. Heard*, 367 F.3d 1275 (11th Cir.), *cert. denied*, 160 L. Ed. 2d 194 (2004) (police intervened in an argument between defendant and a woman at a train station. The woman then advised the officer that defendant was carrying a gun but she jumped on a train before giving a statement. Officer had an opportunity to judge the demeanor and credibility of the unknown woman and thus could conclude that she would have reliable information about whether defendant possessed a gun); *United States v. Holmes*, 360 F.3d 1339 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 1046 (2005) (pedestrian flagged down an officer and reported seeing a described, intoxicated man in the area brandishing a gun; suspicious conduct by suspect led to pat-down).

Since the ratiocination of *J.L.* is clearly stated, the various circuits have had no difficulty in its application. The circuits are in solid agreement that an anonymous tip, without more, does not provide enough basis to sustain a stop or frisk, whereas when sufficient other facts do exist, the stop is found to be justified: *United States v. Pleas*, 2007 U.S. Dist. LEXIS 76237 (D. Mass. 2007) (anonymous caller refusing to give her name regarding generally described male who had put a gun to her sister three days earlier did not justify pat-frisk of male sitting on his porch exhibiting no suspicious behavior); *United States v. Colon*, 250 F.3d 130 (2d Cir. 2001) (anonymous caller refusing to give her name reported a generally

described male in an after-hours bar did not justify a pat-frisk of male exhibiting no suspicious behavior); *United States v. Ubiles*, 224 F.3d 213 (3d Cir. 2000) (anonymous tipster personally indicating that male at carnival had a gun in his possession did not justify a pat-frisk of male exhibiting no suspicious behavior); *United States v. Perkins*, 363 F.3d 317 (4th Cir. 2004), *cert. denied*, 543 U.S. 1056 (2005) (police relied upon confirmation of information, including suspicious circumstances, to justify stop of vehicle where rifle was observed in plain view); *United States v. Blackshaw*, 367 F. Supp. 2d 1165 (N.D. Ohio 2005) (anonymous call regarding dispute in street did not justify pat-down of occupants of parked vehicle where factual discrepancies existed in officer's observations and there was a lack of suspicious behavior); *United States v. Whitaker*, 546 F.3d 902 (7th Cir. 2008) (two calls in succession, including one by a victim/relative, regarding armed male of an arguing couple, together with police observations, justified search of vehicle); *United States v. Hughes*, 517 F.3d 1013 (8th Cir. 2008) (anonymous call of suspicious persons possibly trespassing did not justify pat-frisk of male near bus stop not engaging in any suspicious activity); *United States v. Copening*, 506 F.3d 1241 (10th Cir. 2007) *cert. denied*, 2008 U.S. LEXIS 4986 (2008) (five calls from caller who was following a vehicle containing a male whom caller observed dropping gun outside convenience store, then placing gun under seat of vehicle, justified stop of vehicle).

Before this Court is a case wherein an anonymous caller reported the flashing of a gun in a particular vehicle. The record contains no facts upon which it

can be determined if the tip was conveyed in close proximity to the actual stop. The record contains no facts upon which it can be determined if the caller was an eyewitness or was reporting rumor. No features existed, either supporting reliability or narrowing the likely class of informants, to determine anything regarding the caller. No information whatsoever was given about the person with the gun — no gender, race, height and weight, clothing — no identifiers at all were provided. Even *J.L.* had a description of the suspect and his visible attributes. *J.L.*, 529 U.S. at 268. Moreover, nothing in the tip indicates whether the gun was lawfully possessed.

An anonymous tip can form the basis for reasonable suspicion only if it is accompanied by specific indicia of reliability. For example, the correct forecast of a subject's "not easily predicted" movements noted in *Alabama v. White*, 496 U.S. 325, 332, 110 L. Ed. 2d 301 (1990), was the deciding factor in that "borderline" case. No forecasting existed in this case as no predictive information was given.

Due to the sparseness of the tip, the police were without means to test the informant's knowledge or credibility. Despite trying to verify the information, the police ultimately lacked a reasonable basis for suspecting any of the occupants of the vehicle of engaging in unlawful conduct. This was so even though the report of a gun ultimately proved correct. The officers' suspicion that a gun was in the Durango arose not from any observations of their own but "solely from a call made from an unknown location by an unknown caller." *Richards*, 351 N.J. Super. at 302, 798 A.2d at 141.

Even assuming the flashing of a gun occurred, no criminal wrongdoing necessarily occurred. New Jersey allows carry permits for guns under N.J. Stat. Ann. §2C:58-4. As such, no known, definable criminal conduct was reported. The mere possession of a gun is simply not illegal with a permit. Therefore, in this case, the State has not even established any criminal conduct. Criminal conduct may be presumed under certain circumstances where ongoing emergencies reveal by their very nature that quick action is necessary. *See Ruidiaz*, 529 F.3d at 31 (report of gunfire); *United States v. Wheat*, 278 F.3d 722 (8th Cir. 2001) (report of reckless driver). The strong exigency rationales for quick police action are altogether absent in this case.

Additionally, in undertaking the investigation of the situation, the police uncovered no indications of criminality — no illegal or unusual conduct. Nothing showed that "criminal activity may be afoot" as noted in *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884 (1968). The vehicle was parked in a well-lit business district. None of the three occupants were engaged in any furtive or nervous behavior. There were no threatening or unusual movements. The three cooperated fully and followed all directives with their forced removal from the vehicle and their resultant pat-down frisks. None attempted to flee. When examining the facts of this case under existing case law defining the scope of permissible stop and frisks, the stop clearly exceeded the bounds defined.

J.L. requires more than these facts before a search would be constitutionally permissible. Some suitable indication of corroboration was needed and yet was

conspicuously absent. Precedent establishes that based on the whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person(s) stopped of criminal activity. *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 694-95 (1981).

Petitioner notes at page 7 that the legality of the stop of the vehicle is not at issue in this petition. This is patently incorrect. Respondent specifically challenged the legality of the stop below and continues to challenge the legality of the stop. State case law expressly holds that an anonymous tip that an undescribed black male in a public telephone booth near a tire store in the early hours of the morning was armed with a gun was insufficient to justify an investigatory stop, even when the suspect declined to respond to police questioning. *Richards*, 351 N.J. Super. at 306, 798 A.2d at 146. An anonymous tip that an otherwise undescribed black man in a green and purple multipurpose vehicle parked at a particular location was carrying a gun did not provide the objectively reasonable suspicion required for an investigatory stop unless it was sufficiently corroborated by other evidence. When no suspicious conduct is observed prior to law enforcement's intrusion, the resultant stop and the resultant search are illegal. *Goree*, 327 N.J. Super. at 240, 742 A.2d at 1047.

The Appellate Division's finding that a properly parked but occupied vehicle at 2:30 a.m. justified a community caretaking inquiry to determine if help was needed, is misplaced and is an improper finding under these facts.[3] Nonetheless,

[3] The Appellate Division states the vehicle was parked "on the roadway" but the trial testimony indicates that the vehicle was already parked in a parking spot when the police came up behind it.

the same court found that the resultant *Terry* pat-down searches and the search of the vehicle exceeded any community caretaking justification.

Finally, Petitioner bases a large portion of his argument on the tinted windows that were present on the Durango. Nothing in the record indicated that they were other than factory-issue. As such, they are legal in New Jersey. No testimony was given that additional, "after-factory" tinted material was added which may have violated N.J. Stat. Ann. §39:3-74 (prohibiting windows which fail to meet the standard in N.J.A.C §13:20-33.7). Petitioner's footnote 2 on page 15 is without basis in the record.

The rule of law remains that an anonymous tip, standing alone, cannot justify a stop and frisk. The unanimous opinion of this Court in *J.L.* provides clear direction for courts to follow and apply to each case's factual underpinnings and the circuits have done so without difficulty. As there is nothing unique about the instant matter and no substantial question is raised, the petition for writ of *certiorari* should be denied.

CONCLUSION

Based on the foregoing arguments, Respondent respectfully urges that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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Dated: December 23, 2008